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The Supreme Court's 1987-88 Term: Implications for the Transnational Practitioner

J. Clark Kelso*

This article is the first in a continuing series that will be published in the *Transnational Lawyer* analyzing the transnational implications of decisions by the Supreme Court of the United States. Because of the world-wide importance of American law to the transnational practitioner, and because of the importance in American law of decisions by the Supreme Court of the United States, the editors believe that it is appropriate to reserve space in the journal for a review of the Court's work during the preceding year.

In this first installment, I review two jurisdiction-related decisions, a gray market goods case, and two immigration and naturalization cases. Although virtually any decision by the Supreme Court may have implications for the transnational practitioner, the five decisions selected for this issue appear to have the greatest potential for direct impact on transnational lawyers.¹

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1. The term "transnational law" was employed by Philip Jessup in 1956 to describe all law which regulates actions or events that transcend national frontiers. Since that time, the scope of the term has narrowed to merely the laws that govern international business transactions. MARK W. JANIS, *INTRODUCTION TO INTERNATIONAL LAW* 200 (1988). Perhaps the more apt approach is to define transnational law as the study of legal transactions between the nationals of two or more states. Doland, Book Review, 1 *TRANSNAT'L LAW*. 500 n.2 (1988).

The Court's decision in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 108 S. Ct. 2104 (1988), concerning the Hague Service Convention will be the subject of a student article in the next issue of *The Transnational Lawyer* and is not discussed in this article.

I. EXECUTIVE SUMMARY OF CASES

A. *Jurisdiction Cases*

In *Chick Kam Choo v. Exxon Corp.*,² the Court unanimously held that dismissal of a case from a federal district court on *forum non conveniens* grounds did not necessarily prevent the losing plaintiff from bringing the same suit in state court since the state court might apply different standards to the determination of whether the forum was inconvenient.³ Once a state court action is filed, the issue of whether the federal *forum non conveniens* rules preempted the state rules must generally be litigated in state court.⁴ On that basis, the Court held that the federal district court does not have jurisdiction to enjoin the state court action.⁵ The practical result is that a foreign defendant may find itself subject to suit in state court after it has already obtained a dismissal in federal court on *forum non conveniens* grounds.

In *Omni Capital International v. Rudolf Wolff & Co., Ltd.*,⁶ the Court unanimously held that a federal district court could not imply a service of process provision into the Commodity Exchange Act and that service of process could therefore be had only in accord with the state long-arm statute.⁷ The case is important apart from the Commodity Exchange Act because the Court appears to lay down a broad, black-letter rule that if a federal statute does not contain an explicit service of process provision, a federal court may not imply such a provision, and service must then comply with state law.

B. *Commercial and Business Law*

In *K Mart Corp. v. Cartier, Inc.*,⁸ a sharply divided Court upheld all but one of the Customs Service regulations that permit certain gray market goods (i.e., goods that have imprinted on them a U.S. trademark) to be imported into the United States without the written

2. *Chick Kam Choo v. Exxon Corp.*, 108 S. Ct. 1684 (1988) (O'Connor, J.).

3. *Id.* at 1690-91.

4. *Id.* at 1691.

5. *Id.*

6. *Omni Capital International v. Rudolf Wolff & Co., Ltd.*, 108 S. Ct. 404 (1988) (Blackmun, J.).

7. *Id.* at 413.

8. *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988).

consent of the trademark holder. The decision is a boon to discount shoppers since gray market goods are always cheaper (sometimes as much as 20 to 40 percent cheaper) than the authorized imports.⁹ Removing the uncertainty surrounding the legality of the gray market imports is sure to increase the size of the already multi-billion dollar gray market industry.

C. *Immigration and Naturalization*

In *Immigration and Naturalization Service v. Abudu*,¹⁰ the Court held that the abuse of discretion standard of review applies to a decision by the Board of Immigration Appeals not to reopen a deportation proceeding on the basis of newly discovered evidence.¹¹ The case is a good example of the Court granting special deference to the Board of Immigration Appeals because of the political and foreign policy implications of deportation proceedings.

In *Kungys v. United States*,¹² the Court held that a misrepresentation in the course of naturalization proceedings is "material" only if it has "a natural tendency to influence the decisions of the INS."¹³ In so holding, the Court rejected a more specific test that it had propounded almost thirty years ago.¹⁴ There was no majority opinion, however, and it is unclear how the new materiality definition should be applied. The Court thus seems to have created more confusion in an already perplexing area of law.

II. THE JURISDICTION OF UNITED STATES COURTS

One of the most important legal questions that a non-American business must face in its planning is whether its activities will be subject to United States law in a United States courtroom. The sheer expense of litigating in the United States is certainly an important

9. Justice Kennedy, the author of the key opinion in *K Mart*, reportedly quipped that his colleagues on the Court now call out as he walks down the hall "Attention K-Mart Shoppers," a reference to K-Mart promotional advertisements. *San Francisco Recorder*, June 13, 1988, at 9.

10. *Immigration and Naturalization Service v. Abudu*, 108 S. Ct. 904 (1988).

11. *Id.* at 907.

12. *Kungys v. United States*, 108 S. Ct. 1537 (1988).

13. *Id.* at 1547.

14. In *Chaunt v. United States*, 364 U.S. 350, 355 (1960), the Court had defined a "material fact" under the statute as one which, "if known, would have warranted denial of citizenship" or which "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Id.*

consideration for any business (including U.S. companies).¹⁵ Perhaps more important, however, is the possible application of United States law to the conduct of non-U.S. businesses. The law of the United States may impose stricter obligations upon foreign businesses than does the law of the homeland of the business. If a United States court asserts jurisdiction over a case, that naturally increases the likelihood that U.S. law will apply.¹⁶

Given the importance for planning purposes of knowing whether a United States court will extend its jurisdiction over a non-U.S. business, it would be a happy task to report that United States courts have adopted a uniform, simple test that a non-U.S. business could use to predict the risk of being required to litigate in the United States. Sadly, the Supreme Court of the United States has done little to clarify the jurisdictional reach of United States courts with respect to a foreign defendant. The constitutional limits of jurisdiction are marked by the "minimum contacts" test¹⁷ and, if the minimum contacts test is satisfied, by "traditional notions of fair play and substantial justice."¹⁸ Both tests find their origin in *International Shoe Co. v. Washington*,¹⁹ the Supreme Court's leading modern case on personal jurisdiction. Both tests involve a balancing of factors, making predictability and application in specific cases difficult.²⁰

15. "It is a sad commentary on the effectiveness of the law on both the national and international levels that it took two years and the expenditure of over \$25 million in legal costs alone simply to identify the proper forum for suits arising out of the [Bhopal] disaster." McCaffrey, *Accidents Do Happen: Hazardous Technology and International Tort Litigation*, 1 TRANSNAT'L LAW. 41, 41-42 (1988) (footnote omitted).

16. A court is more likely to apply its own law rather than foreign law because it is more familiar with the law of the forum. A court thus may have an interest in applying forum law irrespective of the controversy before the court. See *Strassberg v. New England Mut. Life Ins. Co.*, 575 F.2d 1262, 1264 (9th Cir. 1978) (noting the preference under California choice-of-law rules for applying forum law). But see RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 comment e (1969). The only constitutional limit on the application of forum law, is that the forum must have a "significant contact or significant aggregation of contacts" which creates "state interests" such that application of forum law is not arbitrary or unfair. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).

17. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Hanson v. Denckla*, 357 U.S. 235, 253 (1953); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

18. *International Shoe Co.*, 326 U.S. at 316.

19. *Id.*

20. The newly-published RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1987) does not clearly set forth these two tests. Instead, the Section provides in subsection (1) that jurisdiction exists "if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable," and provides in subsection (2) a list of situation-types in which jurisdiction is reasonable:

(a) the person or thing is present in the territory of the state, other than transitorily;

The Court's failure to clarify its jurisdictional rules has in large part been a result of its inward-looking perspective. In the past, jurisdictional questions have arisen most frequently in an inter-state rather than an international context.²¹ In the inter-state context, the Court has stressed the importance of federalism, thereby giving recognition to the sovereign status of each state in the United States.²² Possibly because of the Court's narrow views of federalism underlying U.S. jurisdictional doctrines, coupled with the absence of international cases that directly trigger the "minimum contacts" and the "fair play and substantial justice" tests, the Court has failed to define the scope of these tests in international settings.²³

However, the Court attempted to resolve some of these problems in the 1986-87 Term in *Asahi Metal Industry Co. v. Superior Court*

(b) the person, if a natural person, is domiciled in the state; (c) the person, if a natural person, is resident in the state; (d) the person, if a natural person, is a national of the state; (e) the person, if a corporation or comparable juridical person, is organized pursuant to the law of the state; (f) a ship, aircraft or other vehicle to which the adjudication relates is registered under the laws of the state; (g) the person, whether natural or juridical, has consented to the exercise of jurisdiction; (h) the person, whether natural or juridical, has regularly carried on business in the state; (i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity; (j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity; or (k) the thing that is the subject of adjudication is owned, possessed, or used in the state, but only in respect of a claim reasonably connected with that thing.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(1), (2) (1987). This list is somewhat more helpful than the Supreme Court's two tests, although in close cases, a practitioner must of course parse the Supreme Court's language and not the Restatement language.

21. For example, the leading case on personal jurisdiction, *International Shoe Co. v. Washington*, involved a Delaware corporation sued in the State of Washington. 326 U.S. 310 (1945). See also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (Florida corporation sued by Michigan resident); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (New York corporations sued by driver who was in an automobile accident in Oklahoma); *Hanson v. Denckla*, 357 U.S. 235 (1958) (trust agreement executed in Delaware between Delaware corporation and Pennsylvania domiciliary who later moved to Florida); *McGee v. Internat'l Life Ins. Co.*, 355 U.S. 220 (1957) (Texas insurance company and California resident). But see *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984) (finding insufficient contacts to justify assertion of jurisdiction by Texas courts over Colombian corporation).

22. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 326 (Black, J., concurring).

23. The Court's jurisdictional rules have worked tolerably well in the United States because we are well experienced with our own federal system. A foreign practitioner, however, may be surprised at the implications of our federal structure, and the federalism-based rules may not work so well in an international context. For example, in a suit by a California or New York resident against a German corporation, the federalism concerns that are present in an inter-state litigation seem less appropriate and are surely of less importance. It also must be of concern and wonder to a foreign practitioner that a client may find itself subject to the varying laws of more than fifty state jurisdictions.

of California.²⁴ In *Asahi*, the Court considered whether a California state court had personal jurisdiction over a Japanese manufacturer of component parts who had been sued for indemnification by a Taiwanese manufacturer based upon a transaction that took place in Taiwan.²⁵ The component part manufacturer made valves for motorcycle tire tubes which were sold to the Taiwanese manufacturer of the tubes. The underlying action was brought in California by the victim of a motorcycle accident. Following a settlement between the plaintiff and the primary defendants, the only claim remaining was the indemnification claim by the Taiwanese manufacturer against the Japanese manufacturer.²⁶

A majority of the Court in *Asahi* held that assertion of jurisdiction over the Japanese component part manufacturer in these circumstances would "offend 'traditional notions of fair play and substantial justice.'" ²⁷ Refreshingly, the Court applied this test in *Asahi* with a keen eye on the transnational implications of extending jurisdiction beyond U.S. borders. Thus, in considering the burden placed upon the defendant, the Court noted that: "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."²⁸

The Court also instructed that in balancing the interests of the possible forums "a court [must] consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court."²⁹ More generally, the Court cautioned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."³⁰

Although a majority of the Court was clearly sensitive to transnational concerns when it came to application of the "fair play and

24. *Asahi Metal Industry Co. v. Superior Court of California*, 107 S. Ct. 1026 (1987).

25. The component part manufacturer, *Asahi Metal Industry Co.* (a Japanese corporation), entered into an agreement with, and sold to, *Cheng Shin* (a Taiwanese corporation), valve stems to be used in finished tire tubes. The sales to *Cheng Shin* took place in Taiwan. The shipments from *Asahi* to *Cheng Shin* were sent from Japan to Taiwan where they were redistributed by *Cheng Shin*. *Id.* at 1029-30.

26. *Id.*

27. *Id.* at 107 S. Ct. 1026 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

28. *Id.* at 1034.

29. *Asahi*, 107 S. Ct. at 1034 (emphasis in original).

30. *Id.* at 1035 (quoting *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

substantial justice" test, the Court was more fractured in its approach to the "minimum contacts" test. A plurality of justices (O'Connor, Rehnquist, Powell and Scalia) thought that the minimum contacts test was also not satisfied because the Japanese component part manufacturer did nothing "to purposefully avail itself of the California market."³¹ Rather, the component part manufacturer did nothing more than place the product "into the stream of commerce"³² which, according to this plurality, was "not an act of the defendant purposefully directed toward the forum State."³³ This view surely reflects an appreciation that the interconnectedness of international markets does not equate with worldwide jurisdiction for United States courts.

But Justice O'Connor's opinion concerning the "minimum contacts" test was only a plurality. Four other justices (Brennan, White, Marshall and Blackmun) argued that the minimum contacts test is satisfied when a foreign defendant puts a product into the stream of commerce with knowledge "that the final product is being marketed in the forum State."³⁴ According to these justices, the manufacturer's "regular and extensive sales of component parts to a manufacturer it knew was making regular sales of the final product in California is [s]ufficient to establish minimum contacts with California."³⁵ Although this "stream of commerce" theory is certainly favored by a majority of United States courts and commentators,³⁶ it is surely a cause of concern for transnational businesses.

The ninth justice to vote in *Asahi*, Justice Stevens, did not join Justice O'Connor's opinion because he believed that even under the "purposeful availment" test, the requisite minimum contacts existed.³⁷ Justice Stevens explained that, in his view, "a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment' even though the item delivered to the forum State was a standard product marketed throughout the world."³⁸ Resolution of this battle

31. *Id.* at 1033.

32. Defined in Justice Brennan's opinion as "the regular and anticipated flow of products from manufacture to distribution to retail sale." *Id.* at 1035 (Brennan, J., concurring in part).

33. *Id.* at 1033.

34. *Asahi*, 107 S. Ct. at 1035 (Brennan, J., concurring in part).

35. *Id.* at 1037-38 (Brennan, J., concurring in part).

36. See the list of authorities cited in *Asahi*, 107 S. Ct. at 1036 nn.1, 2 (Brennan, J., concurring in part).

37. *Id.* at 1038 (Stevens, J., concurring in part).

38. *Id.*

between the "stream of commerce" theory and the "purposeful availment" theory must await future cases, and because Justice Kennedy replaced Justice Powell (who voted in *Asahi* in favor of the "purposeful availment" application), predicting how the Court will resolve the debate is virtually impossible.

In its 1987-88 Term, the Court heard two jurisdiction related cases. In *Chick Kam Choo v. Exxon Corp.*,³⁹ the Court applied its rather wooden interpretation of the Anti-Injunction Act to require a defendant who had already won a dismissal in federal court in Texas on *forum non conveniens* grounds to relitigate the same issue in a Texas state court. Although the result in *Chick Kam Choo* is arguably correct as a matter of federalism, it appears to be a step backward from the Court's more internationalist (and less federalist) perspective in *Asahi*.

Chick Kam Choo involved the death of a Singapore resident in Singapore. The plaintiff (also a resident of Singapore) filed suit in the United States District Court for the Southern District of Texas against Exxon Corp. (which has its headquarters in Houston, Texas) alleging claims under both federal law and Texas state law for the death of her husband.⁴⁰ The district court dismissed the federal claims on a motion for summary judgment,⁴¹ and dismissed the state claim for *forum non conveniens*.⁴² As part of its *forum non conveniens* analysis, the district court held that Singapore law, and not Texas law, applied to all claims.⁴³ The Fifth Circuit affirmed dismissal of all claims.⁴⁴

Faced with this defeat, the plaintiff—obviously eager to maintain the action before a Texas jury that might be more receptive and sympathetic to the plaintiff and, if liability were found, would possibly award higher damages than a Singapore jury—filed the same

39. *Chick Kam Choo v. Exxon Corp.*, 108 S. Ct. 1684 (1988).

40. The federal claims were under the Jones Act, 46 U.S.C. § 688 (1982 & Supp. III 1985); the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-67 (1982 & Supp. III 1985); and the general maritime law of the United States. The state action was based on the Texas Wrongful Death Statutes, TEX. CIV. PRAC. & REM. CODE ANN. (Vernon) §§ 71.001-71.031 (1986). *Chick Kam Choo*, 108 S. Ct. at 1687.

41. The Jones Act was held inapplicable since the decedent was not a seaman. The Death on the High Seas Act was held inapplicable since the death occurred while the ship was in port (rather than on the high seas). The general maritime law of the United States was held inapplicable under a choice-of-law analysis. *Chick Kam Choo*, 108 S. Ct. at 1687-88.

42. *Id.* at 1688.

43. *Id.*

44. *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir.), cert. denied, 464 U.S. 826 (1983).

complaint *plus* a claim under Singapore law in a Texas state court.⁴⁵ Apparently realizing that the existence of the federal claims in the complaint made removal to the Texas federal court a likely possibility,⁴⁶ the plaintiff voluntarily dismissed the federal claims, leaving a claim under Texas law and a claim under Singapore law.⁴⁷ The defendant's attempt subsequently to remove the case to federal court failed for lack of complete diversity.⁴⁸

The defendant, hoping to avoid litigation in a Texas state court, filed an action in *federal* court to enjoin the state suit.⁴⁹ The federal action was a calculated risk. As a general matter, the Anti-Injunction Act prohibits a federal court from enjoining a state court proceeding.⁵⁰ Moreover, the Anti-Injunction Act has long been regarded by the Supreme Court as one of the bulwarks of our federal system in which both federal and state courts must operate contemporaneously.⁵¹ Although the Anti-Injunction Act puts state courts on the same level as federal courts for some purposes—“[d]ue in no small part to the fundamental constitutional independence of the States”⁵²—the supremacy of federal law suggests that there may be some circumstances in which a federal court *can* enjoin the action of a state court.⁵³ The Anti-Injunction Act provides for three such exceptions: (1) “as expressly authorized by Act of Congress”; (2) “where necessary in aid of its jurisdiction”; and (3) “to protect or effectuate its judgments.”⁵⁴

The third exception—often called the “relitigation exception”—was the only ground arguably applicable in *Chick Kam Choo*. The defendant argued that, having litigated and lost the *forum non*

45. *Chick Kam Choo*, 108 S. Ct. at 1688.

46. See 28 U.S.C.S. § 1441 (Law. Co-op 1988).

47. *Chick Kam Choo*, 108 S. Ct. at 1688.

48. *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148 (5th Cir. 1985).

49. *Chick Kam Choo*, 108 S. Ct. at 1688.

50. 28 U.S.C. § 2283 (1982) provides: “A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”

Id.

51. See, e.g., *Chick Kam Choo*, 108 S. Ct. at 1689; *Pennzoil Co. v. Texaco Inc.*, 107 S. Ct. 1519, 1524 (1987); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977) (plurality opinion); *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 287 (1970).

52. *Chick Kam Choo*, 108 S. Ct. at 1689.

53. As a theoretical matter, it would be possible to have a system in which a lower federal court could *never* enjoin a state proceeding and where the only relief from improper state court action would be an appeal to the Supreme Court of the United States. Such a system in the United States would be unworkable as a practical matter given the large size of our judicial system and the relatively small resources available to the Supreme Court.

54. 28 U.S.C. § 2283 (1982).

conveniens issue in Texas federal court, the plaintiff should not be permitted to relitigate that issue in a Texas state court.⁵⁵ The Fifth Circuit agreed, despite an argument that the Texas rule on *forum non conveniens* was significantly more generous to the plaintiff than the federal rule.⁵⁶ The Fifth Circuit avoided the potentially conflicting Texas law by holding that, in a maritime context, the federal *forum non conveniens* rule preempted any contrary state rule, under the so-called "reverse-Erie" doctrine.⁵⁷ Since the federal rule preempted any contrary Texas rule, the Fifth Circuit held that the prior federal determination that Texas was not a convenient forum was binding on the state court and could not be relitigated in that court.

The Supreme Court reversed in part and affirmed in part, with only Justice White concurring separately. The Court held that the injunction was proper with respect to the Texas state claim since the federal district court had held in the prior suit that Singapore law, not Texas law, applied.⁵⁸ But the Court held that the injunction against prosecution of the Singapore claim was barred by the Anti-Injunction Act.⁵⁹

The Court's reasoning with respect to the Singapore claim demonstrates that its formal and narrow federalism rules will at times win out over competing considerations of efficiency and fairness. The key to the Court's holding is found in what the Court itself described as a "strict and narrow" rule that "... an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings *actually have been decided by the federal court.*"⁶⁰

According to the Court, the federal court in the first lawsuit decided only that, applying federal *forum non conveniens* principles,

55. *Chick Kam Choo*, 108 S. Ct. at 1691.

56. The majority noted that, in light of the Texas "open courts" provision, TEX. CONST., Art. I, § 13 (which is incorporated into the Texas Wrongful Death Statutes, TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (1986)), it may be that "Texas has constituted itself the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere else." *Chick Kam Choo*, 108 S. Ct. at 1688-89 (citing *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 314 (5th Cir. 1987)) (footnote omitted).

57. *Chick Kam Choo*, 108 S. Ct. at 1689. Under the *Erie* doctrine, a federal court is ordinarily required to apply state substantive law except in matters governed by the Constitution or acts of Congress. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In maritime matters, however, the "reverse-Erie" doctrine provides that state courts are required to apply federal maritime law. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986) (when respondents' husbands were killed in a helicopter crash off the coast of Louisiana, federal maritime law was clearly intended to control).

58. *Chick Kam Choo*, 108 S. Ct. at 1691-92.

59. *Id.* at 1691.

60. *Id.* at 1690 (emphasis added).

the Texas federal court was not an appropriate forum to litigate the Singapore claim.⁶¹ The federal court did not decide under *state* law that Texas was an inconvenient forum, a result that might be different under Texas' more liberal rules. The Court then resolved the remaining preemption argument (that is, that federal *forum non conveniens* law preempted inconsistent state law), by holding that since the preemption question was not itself litigated in the first lawsuit, litigation of that question in the second federal suit did not fall within the relitigation exception to the Anti-Injunction Act.⁶² Accordingly, that portion of the injunction directed against the Singapore claim was invalid, thus requiring Exxon to defend against that claim in state court.

The Court's interpretation of the relitigation exception is certainly, as the Court itself admits, "strict and narrow." It is, in this writer's view, unnecessary and unreasonable. The Court's holding is a reaction to the possibility of federal court injunctions against "state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law."⁶³ Yet the injunction in *Chick Kam Choo* was based not merely upon state court interference with a federal right or invasion of an area preempted by federal law. Rather it was based upon interference with a federal right that had been judicially declared to exist: a right to avoid a lawsuit in Texas. That the first federal court did not utter in the same breath "and the federal rule preempts Texas law" is not a particularly good reason for permitting a state action to go forward if, as a matter of law, the federal rule prevails. There is no good reason why that legal question should not be resolved by the federal court as it acts "to protect or effectuate its judgments."⁶⁴

In defense of the Court's holding, it can be argued that since the Texas courts are presumed to be competent to decide federal issues (such as preemption) and since the Supreme Court has the power to review any incorrect state court determinations of federal issues, it does not significantly harm a litigant to be forced to litigate in a Texas state court once there. It is, however, a supreme irony from the Supreme Court that it cited in support of this reasoning *Pennzoil Co. v. Texaco, Inc.*,⁶⁵ a case in which the Texas state courts'

61. *Id.*

62. *Id.* at 1691.

63. *Chick Kam Choo*, 108 S. Ct. at 1691.

64. 28 U.S.C. § 2283 (1982).

65. *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519 (1987).

competence to deal with federal issues was questionable at best.⁶⁶

Moreover, the Court's decision leaves the practitioner in a no-win situation. The preemption question (whether federal *forum non conveniens* rules preempt state law) will not be ripe for resolution in the first federal suit since, in the absence of an on-going state suit, the federal court will have no reason to consider the issue. But, by the time the plaintiff has discovered a new cause of action and filed suit in state court (which might be more hospitable to the plaintiff's claims), the Anti-Injunction Act will prevent litigation of the issue in federal court. The peculiar result of the Court's reasoning is that, with some degree of foresight, a plaintiff's lawyer can keep the federal issue of whether federal *forum non conveniens* rules preempt state rules from being litigated in a federal court other than the Supreme Court on appeal from a state court judgment.

For a foreign defendant (unlike Exxon Corp., the defendant in *Chick Kam Choo*), the hardship of the Court's ruling is even more apparent. Forced to bear the burdens of litigating in a federal court which has been judicially determined to be an inconvenient forum, the foreign litigant must be prepared to face another suit in state court which may be located across the street from the federal court and will surely be equally inconvenient. Hopefully, if another case like *Chick Kam Choo* arises, but with a foreign defendant rather than a domestic defendant, the Court will recognize the implications of imposing our somewhat bizarre federal structure upon the international community, just as the Court recognized the international implications of extending jurisdiction over a foreign defendant in *Asahi*.

The Court did, however, forge some headway in its other jurisdiction case in the 1987 Term, providing clear guidance both to lower courts and to practitioners with a black-letter rule. In *Omni Capital International v. Rudolf Wolff & Co., Ltd.*,⁶⁷ the Court held that a Louisiana federal court had no personal jurisdiction over a British corporation in a suit alleging an implied private cause of action

66. The Supreme Court of Texas refused to hear oral argument or issue a written opinion in the largest civil case in American history that raised important issues of both state and federal law. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Court of Appeals 1977), *writ ref'd n.r.e.*, 748 S.W.2d 631 (1987). Two lower federal courts had previously concluded that Texaco raised substantial federal questions in its appeal from the Texas judgment. See *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250 (S.D.N.Y. 1986), *aff'd in part and rev'd in part*, 784 F.2d 1133 (2d Cir. 1986), *rev'd*, 107 S. Ct. 1519 (1987). The author was a member of Texaco's litigation team in these cases.

67. *Omni Capital International v. Rudolf Wolff & Co., Ltd.*, 108 S. Ct. 404 (1987).

under the Commodity Exchange Act (CEA).⁶⁸ The key point of the case lies in the now black-letter rule that where there is no express provision for service of process in a federal statute, personal jurisdiction can be obtained only under a state long-arm statute.⁶⁹ A federal court cannot create its own ad hoc service of process rules.⁷⁰

Omni Capital arose out of a commodity futures investment program marketed by two New York corporations, Omni Capital International, Ltd., and Omni Capital Corporation (Omni). Omni allegedly misrepresented the tax benefits and profits of the program to investors. When the Internal Revenue Service disallowed income tax deductions related to losses in the program, the investors sued Omni. Omni impleaded Rudolf Wolff & Co., a British corporation, and James Gourlay, a citizen and resident of the United Kingdom and employee of Wolff.⁷¹ The first complaints, filed in 1980 and 1981 in the United States District Court for the Eastern District of Louisiana, alleged violations of the federal securities laws⁷² as well as violations of state law. After the Supreme Court decided in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*⁷³ that an implied private cause of action existed under the CEA,⁷⁴ the complaint was amended

68. *Id.* at 411. It was conceded before the Court that the requirements of the Louisiana long-arm statute, which would have provided another basis for personal jurisdiction, were not met. *Id.*

69. *Id.* at 410-11.

70. The Court did not actually hold that a federal court lacks *all* power to fashion its own service of process rules. Instead, the Court technically held only that "we would not fashion a rule for service in this litigation even if we had the power to do so." *Id.* at 412. But this conclusion followed a rather lengthy list of hurdles that the Court would have to surmount before deciding it had such a power:

As an initial matter, it is unclear at this time whether it is open to us to fashion a rule authorizing service of process. At common law, a court lacked authority to issue process outside its district, and Congress made this same restriction the general rule when it enacted the Judiciary Act of Sept. 24, 1789, § 11, 1 Stat. 19. See *Robertson v. Railroad Labor Board*, 268 U.S. 619, 622-623 (1925). Thus, specific legislative authorization of extraterritorial service of summons was required for a court to exercise personal jurisdiction over a person outside the district. Even were we to conclude that the bases for the rule in *Robertson* are no longer valid, we would not necessarily have the power to create service-of-process rules. We would have to decide that the provisions of Rules 4(e) and 4(f), in authorizing service in certain circumstances, were not intended to prohibit service in all other circumstances. We would also have to find adequate authority for common-law rulemaking.

Omni Capital, 108 S. Ct. at 412.

71. *Omni Capital*, 108 S. Ct. at 407.

72. The Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C.S. §§ 78a-78kk (Law. Co-op. 1983 & Supp. 1988); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1987); The Securities Act of 1933, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a-77bbbb) (Law. Co-op. 1975 & Supp. 1988). See *Omni Capital*, 108 S. Ct. at 407.

73. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982).

74. Commodity Exchange Act, 42 Stat. 998 (codified as amended at 7 U.S.C.S. §§ 1-26 (Law. Co-op. 1976 & Supp. 1988).

to include an action under the CEA. The district court subsequently dismissed the securities laws claims, holding that they were superceded by passage of the CEA.⁷⁵

The district court initially held that it had jurisdiction over the British defendants despite the absence of an explicit service of process provision in the CEA because "Congress intended for United States courts to exercise personal jurisdiction over foreign defendants not present in the United States to the limits of the due process clause of the Fifth Amendment."⁷⁶ The district court subsequently reversed itself after a Fifth Circuit decision held that in the absence of an explicit service of process provision in a federal statute, process may be served only in accordance with a state long-arm statute.⁷⁷ Since the requirements of the Louisiana long-arm statute were not met, the district court dismissed the CEA claims and entered final judgment in favor of the defendants.⁷⁸ The Fifth Circuit affirmed the dismissal.⁷⁹

The Supreme Court agreed that there was no jurisdiction. The Court first reaffirmed the principle that service of process is a necessary prerequisite to a federal court's assertion of personal jurisdiction.⁸⁰ Since the defendants did not consent to service, service could be had only if authorized by law.⁸¹ Rule 4 of the Federal Rules of Civil Procedure is the fount of a federal court's power to serve process. Rule 4(e), the relevant provision in *Omni Capital*, provides that: "[w]henever a statute of the United States . . . provides for service of a summons . . . upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute."⁸² In the absence of such a federal statute, a federal district court looks to "a statute . . . of the state in which the district court is held," which in *Omni Capital* meant the Louisiana long-arm statute.⁸³

Since the CEA did not expressly provide for service of summons, the first issue for the Court was whether a service of summons

75. *Omni Capital*, 108 S. Ct. at 407.

76. *Id.* at 407 (quoting App. 9).

77. *Id.* at 408. See *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1266 (5th Cir. 1983) (discussing *Burnstein v. State Bar of California*, 693 F.2d 511 (5th Cir. 1982)).

78. *Omni Capital*, 108 S. Ct. at 408.

79. *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (5th Cir. 1986).

80. *Omni Capital*, 108 S. Ct. at 409.

81. *Omni Capital*, 108 S. Ct. 404 (1988).

82. Fed. R. Civ. P. 4(e).

83. *Omni Capital*, 108 S. Ct. 404 (1988).

provision was somehow implied in the Act. The Court's task here was made somewhat easier by the passage of the Futures Trading Act of 1982 which explicitly authorized the private right of action that *Curran* had earlier held was implied in the CEA.⁸⁴ The Futures Trading Act did *not* explicitly provide for service of process. Faced with many related and analogous statutes that *did* contain an express service of process provision,⁸⁵ the absence of such a provision in the Futures Trading Act was viewed by the Court as a relatively clear signal that no such provision was implied.⁸⁶ Although the plaintiffs' argument technically was that service of process should have been implied for the private cause of action created by *Curran* (rather than implied in the Futures Trading Act), the Court, understandably, held that it would not imply a service of process provision for the *Curran*-created cause of action when Congress did not expressly provide for service of process in its *Curran*-inspired Futures Trading Act.⁸⁷

Since no service of process provision was implied in the CEA, the only remaining question was whether a federal court could fill the gap left in the CEA by creating their own service of process rule.⁸⁸ The Court rejected that possibility as far as the CEA was concerned and strongly indicated that it would reject that possibility as a general rule.⁸⁹ In sum, if a federal statute does not explicitly contain a service of process provision, then a federal court can assert jurisdiction over a foreign defendant if, and only if, jurisdiction would be proper under a state long-arm statute.

It is fair to ask why Congress might have enacted the Futures Trading Act of 1982 without including a service of process provision. The Act, after all, explicitly provided that "[t]he United States district courts shall have exclusive jurisdiction of actions brought under this section."⁹⁰ Attempting to explain the gap in the Futures Trading Act,

84. 7 U.S.C.S. § 25 (Law. Co-op. 1978 & Supp. 1988).

85. The Court cited the following: For other civil actions under the CEA, 7 U.S.C.S. §§ 13a-1, 13a-2(4) & 18(d) (Law. Co-op. 1978 & Supp. 1988); for actions under the federal securities laws, 15 U.S.C. §§ 77v (Law. Co-op. 1978 & Supp. 1988) & 78aa (Law. Co-op. 1983 & Supp. 1988). *Omni Capital*, 108 S. Ct. at 410-11.

86. *Omni Capital*, 108 S. Ct. at 410.

87. The Court wrote that "now that Congress has enacted a private cause of action without nationwide service, we have a better perspective on Congress' view of the role of a private action within the statute as a whole. We see no reason to take a different position. Accordingly, we conclude that a nationwide service provision for a private action was not implicit in the CEA." *Id.* at 411.

88. *Id.* at 411-12.

89. *Id.* at 412-13.

90. 7 U.S.C.S. § 25(c) (Law. Co-op. 1983 & Supp. 1988).

Blackmun quoted the following from the legislative history of the act: "[t]he availability of . . . private rights of action supplements, but does not substitute, for the regulatory and enforcement program of the CFTC [Commodity and Futures Trading Commission]. . . . The Committee fully expects (it will) not become necessary to rely on private litigants as a policeman of the Commodity Exchange Act."⁹¹

According to Blackmun, this snippet of legislative history helps to explain why Congress might have decided to omit a service of process section. Specifically, since Congress did not intend private rights of action to be the primary enforcement mechanism, "it is unremarkable that Congress enacted broader service provisions for CFTC actions than for private actions."⁹²

Blackmun's attempt to bolster the Court's conclusion with this citation to the legislative history is not persuasive. In the first place, only four paragraphs earlier in the House Committee's Report, the Committee emphasizes that "the right of an aggrieved person to sue a violator of the Act is *critical to protecting the public and fundamental to maintaining the credibility of the futures market.*"⁹³ If the private right of action is "critical" and "fundamental," then it makes little sense not to have provided for service of process in the federal courts that have exclusive jurisdiction of the cause.

Secondly, Justice Blackmun's selective quote omits several important phrases that are important in understanding the House Report. The full quote is as follows, with the omitted material italicized:

The availability of *these remedies—reparations, arbitration and private rights of action—supplements*, but does not substitute, for the regulatory and enforcement program of the CFTC [Commodity and Futures Trading Commission] *and self-regulatory agencies*. The Committee fully expects *that these agencies will vigorously use the tools at its command to protect the investing public so that it does not become necessary to rely on private litigants as a policeman of the Commodity Exchange Act.*⁹⁴

The complete quote makes it clear that in the language relied upon by Blackmun, the Committee was simply exhorting the Commission

91. *Omni Capital*, 108 S. Ct. at 411 (quoting H.R. Rep. No. 97-565, pt. 1, p. 57 (1982), reprinted in 1983 U.S. CODE CONG. & ADMIN. NEWS 3871, 3906).

92. *Omni Capital*, 108 S. Ct. at 411.

93. H.R. Rep. No. 97-565, pt. 1, p. 56-57, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 3871, 3905-06 (emphasis added).

94. H.R. Rep. No. 97-565, pt. 1, p. 57, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 3871, 3906.

not to lose sight of its responsibilities; the Committee was not suggesting that it viewed the private cause of action as somehow deserving less respect. Moreover the remedy, "reparations," which was listed along with "private rights of action," contained an explicit service of process provision. Thus, Blackmun's conclusion that the paragraph somehow demonstrates why Congress might have omitted a service of process provision for the private right of action makes little sense.

Blackmun's selective and very heavily edited quote from the legislative history is the only thing that mars the Court's opinion. The Court would have been more direct if it had admitted simply that the gap in the Futures Trading Act may have been inadvertent and that it was for Congress, and not the Court, to resolve.

III. COMMERCIAL AND BUSINESS LAW

The most important business law case in the last Term involved the legality of gray market goods. In *K Mart Corp. v. Cartier, Inc.*,⁹⁵ the Court narrowly upheld all but one of the regulations enacted by the Customs Service which had permitted the proliferation of gray market goods in the United States.⁹⁶

As described by the Court, "[a] gray-market good is a foreign-manufactured good, bearing a valid United States trademark, that is imported without the consent of the U.S. trademark holder."⁹⁷ There is a market in such goods because "authorized distributors often charge U.S. retailers more for the goods than they charge retailers in other countries."⁹⁸ The foreign retailers in turn distribute the goods in the United States at prices below what the authorized retailers can charge.⁹⁹ The question presented in *K Mart* was whether

95. *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988).

96. Although there are no reliable government statistics on the size of the gray market, it was described by Justice Brennan as a "multibillion-dollar industry." 108 S. Ct. at 1819 (Brennan, J., concurring). The New York Times reported that "[m]ost estimates put it at below \$10 billion a year in total sales." The N.Y. Times, June 1, 1988, at C6, col. 3.

For a pre-*K Mart* discussion of gray market issues, see Note, *Original Appalachian Artworks, Inc. v. Granada Electronics, Inc.: The Cabbage Patch Doll Goes Gray?* 1 TRANSNAT'L LAW. 339 (1988).

97. *K Mart*, 108 S. Ct. at 1814.

98. Wall St. J., June 1, 1988, at 2, col. 3.

99. "Steven Kurzman, a lawyer who represented a coalition of retailers and gray-market importers in the case, said gray-market goods typically sell in the U.S. for 25% to 40% less than imports handled through authorized distribution channels. The items include cameras, watches, fragrances, cosmetics, electronic goods, liquor and tires made overseas." Wall St. J., June 1, 1988, at 3, col. 3.

Customs Service regulations that legalized the gray market practice in certain circumstances were valid.

The starting point for analysis of the issue is Section 526 of the Tariff Act of 1922 (later reenacted as Section 526 of the Tariff Act of 1930) which provides, in relevant part:

... it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States ... unless written consent of the owner of such trademark is produced at the time of making entry.¹⁰⁰

A superficial reading of this statute would indicate that, unless written consent of the trademark owner is provided, it prohibits the importation into the United States of all products manufactured outside of the United States which bear a United States trademark that is owned by a United States citizen or corporation and is registered by a United States domiciliary. This common sense reading would effectively outlaw the gray market in the United States. The common sense reading is not, however, the reading given to the Statute by the Customs Service. Customs Service regulations have for fifty years interpreted the statute to permit *certain* gray market goods to enter without the written consent of the trademark owner.

In the "prototypical" gray market case, a U.S. firm purchases from an independent foreign manufacturer the right to distribute the manufacturer's products and the right to register and use the manufacturer's trademarks.¹⁰¹ The statute clearly bars importation of those products without the U.S. company's written approval, and Customs Service regulations provide no exception in this circumstance. All members of the Court agreed with this interpretation of the statute.¹⁰²

However, the Customs Service exceptions in *K Mart* did not involve such a prototypical case. Rather, they involved products manufactured and distributed by companies that were related either by corporate structure or by agreement:

(c) Restrictions not applicable. The restrictions . . . do not apply to imported articles when:

100. 19 U.S.C. § 1526(a) (1982).

101. *K Mart*, 108 S. Ct. at 1814-15.

102. *Id.* at 1818.

- (1) Both the foreign and the U.S. trademark or trade name are owned by the same person or business entity;
- (2) The foreign and domestic trademark or trade name owners are parent and subsidiary companies or are otherwise subject to common ownership or control; [or]
- (3) The articles of foreign manufacture bear a recorded trademark or trade name applied under authorization of the U.S. owner¹⁰³

The first two exceptions are referred to jointly as the "common-control" exception, and the third is referred to as the "authorized-use" exception.¹⁰⁴

Because of the deference that the Supreme Court gives to agency interpretations of a statute, the issue before the Supreme Court was whether the Customs Service's interpretation (as expressed in the regulations) was "in conflict with the plain language of the statute."¹⁰⁵ Only if a statute is "clear and unambiguous" will the Supreme Court refuse to defer to an agency's interpretation.¹⁰⁶ According to Justice Kennedy¹⁰⁷ "[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."¹⁰⁸

The common-control exception applies to three different types of corporate manufacturing and distribution schemes: (a) a foreign manufacturer-parent and a wholly owned United States distribution subsidiary which registers a trademark identical to the foreign parent's trademark; (b) a United States parent which registers and owns the trademark and a wholly owned foreign manufacturing subsidiary; and (c) a United States company which registers and owns the trademark and a foreign unincorporated manufacturing division.¹⁰⁹

All members of the Court agreed that the language of the statute was sufficiently ambiguous so that the Customs Service could provide an exception (and allow gray market goods to enter the U.S.) for scheme (a) above, involving a foreign manufacturing parent and

103. 19 C.F.R. § 133.21(c) (1987).

104. *K Mart*, 108 S. Ct. at 1816.

105. *Id.* at 1817.

106. *Id.*

107. Justice Kennedy cast the deciding vote in the case and his opinion is therefore of critical importance.

108. *K Mart*, 108 S. Ct. at 1817. Justice Kennedy cited as primary support for this proposition *Bethesda Hospital Assn. v. Bowen*, 108 S. Ct. 1255 (1988), which was Justice Kennedy's first opinion as an Associate Justice and is a paradigm of how Justice Kennedy approaches issues of statutory construction. *K Mart*, 108 S. Ct. at 1817.

109. *K Mart*, 108 S. Ct. at 1815.

wholly owned United States distribution subsidiary.¹¹⁰ The ambiguity was contained in the italicized language of the statute: "it shall be unlawful to import into the United States any merchandise of foreign manufacture . . . bear[ing] a trademark *owned by* a citizen of, or by a corporation or association created or organized within, the United States"¹¹¹ The ambiguity arises because a trademark owned by a U.S. company that is wholly owned by a foreign manufacturing company may be said to be *actually owned* by the foreign company.¹¹²

Justices Kennedy, White, and Brennan,¹¹³ also believed that the statute was ambiguous with respect to schemes (b) and (c) above, which involve a U.S. parent and a foreign manufacturing firm that is either a wholly owned subsidiary of the U.S. parent or a division of the parent. According to Justice Kennedy, the statutory language, "merchandise of foreign manufacture," is ambiguous in much the same way that the phrase "owned by" is ambiguous.¹¹⁴ Thus, the phrase might well mean "goods manufactured in a foreign country *by a foreign company*."¹¹⁵ Since the foreign manufacturer in schemes (b) and (c) is wholly owned and controlled by a U.S. company (and not a foreign company), the statute arguably would not apply, and gray market competition would be permitted.

With respect to the authorized-use exception, the Court (by a different majority of justices)¹¹⁶ held that no ambiguity in the statute existed which would justify the Customs Service regulation.¹¹⁷ Accordingly, that regulation (which was severable from the others) was struck down,¹¹⁸ and a United States company that authorizes a foreign, independent manufacturer to use the United States trademark for foreign distribution may now finally prevent gray market competition in the United States.

110. *Id.* at 1818.

111. *Id.*, citing 19 U.S.C. § 1526(a) (1982) (emphasis added).

112. 108 S. Ct. at 1818; 108 S. Ct. at 1821 (Brennan, J., concurring in part and dissenting in part); 108 S. Ct. at 1831 (Scalia, J., concurring in part and dissenting in part).

113. Justice White joined in all of Justice Kennedy's opinion with one exception. Justice Brennan wrote separately for himself and Justices Marshall and Stevens. *Id.* at 1819 (Brennan, J., concurring in part and dissenting in part).

114. *Id.* at 1818.

115. *Id.* (emphasis added).

116. Kennedy, Rehnquist, Blackmun, O'Connor and Scalia. *Id.* at 1818-19 (Scalia, J., concurring in part and dissenting in part). Justice White dissented from this portion of Kennedy's opinion. *Id.* at 1819 (Brennan, J., concurring in part and dissenting in part).

117. 108 S. Ct. at 1818-19; 108 S. Ct. at 1831 (Scalia, J., concurring in part and dissenting in part).

118. *Id.* at 1819.

The two other opinions by Justices Brennan and Scalia, both of which concurred in part and dissented in part, speak volumes about the different approaches each Justice takes to statutory interpretation and decision-making. Justice Kennedy limited his opinion to a discussion of the text of the statute and regulation. By contrast, Justice Brennan's opinion goes far beyond the language of the statute to divine, using "traditional tools of statutory construction," the "congressional intent."¹¹⁹ Brennan justified this approach by quoting language originally from *Holy Trinity Church v. United States*,¹²⁰ that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, *nor within the intention of its makers*."¹²¹

In Brennan's view, the Statute was the result of protectionist forces that, more than anything else, hoped "to reserve exclusively to domestic, not foreign, interests the extraordinary protection that § 526 provides."¹²² With this congressional intent identified, and with an approach to statutory interpretation that permitted a court to reach results consistent with that intent even against "the letter of the statute,"¹²³ Brennan was of the view that even the authorized-use exception was permissible. According to Brennan, authorized-use (i.e., trademark licensing) did not generally exist when the Tariff Act of 1922 was enacted.¹²⁴ For Brennan, then, it made no sense to ask whether the authorized-use exception, which was first enacted in 1972,¹²⁵ was consistent with or inconsistent with the statute. Instead, Brennan believed the authorized-use exception was valid because:

Any prescient legislator who could have contemplated that a trademark owner might license the use of its trademark would almost certainly have concluded that such a transaction would divest the licensor not only of the benefit of § 526's importation prohibition, but of *all* trademark protection; and anyone who gave thought to the possibility that a trademark holder might assign rights to use its trademark, along with business and goodwill, to an unrelated manufacturer in another territory had good reason to expect the same result.¹²⁶

119. *Id.* at 1822 (Brennan, J., concurring in part and dissenting in part).

120. *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1982).

121. *K Mart*, 108 S. Ct. at 1821-22 (quoting *Sheetworkers v. Weber*, 443 U.S. 193, 201 (1979)) (emphasis added).

122. *K Mart*, 108 S. Ct. at 1820-21 (Brennan, J., concurring in part and dissenting in part).

123. *Id.* at 1821-22 (quoting *Sheetworkers v. Weber*, 443 U.S. 193, 201 (1979)).

124. *K Mart*, 108 S. Ct. at 1829.

125. 19 C.F.R. § 133.21(c)(3) (1972).

126. *K Mart*, 108 S. Ct. at 1829 (Brennan, J., dissenting).

Justice Brennan thus thought it proper when faced with a situation not contemplated by the drafters of a statute to try to fill that gap based upon a perceived purpose behind the statute, even if the gap was not apparent on the face of the statute itself.¹²⁷

Justice Scalia dissented from that portion of Kennedy's opinion upholding the common-control exception as it applied to a U.S. parent and foreign manufacturing subsidiary or division. In Scalia's view, the phrase "merchandise of foreign manufacture" was not ambiguous and could possibly mean only "manufactured in a foreign country," as opposed to "manufactured by a foreign manufacturer in a foreign country."¹²⁸ In reaching this conclusion, Justice Scalia relied upon, among other things, the Government's petition for writ of certiorari, correspondence between the Customs Service and a United States Senator, and prior versions of the regulations.¹²⁹ Kennedy answered Scalia's challenge in the following passage:

First, the threshold question in ascertaining the correct interpretation of a statute is whether the statute is clear or arguably ambiguous. *The purported gloss any party gives to the statute, or any reference to legislative history, is in the first instance irrelevant.* Further, I

127. *Id.* at 1830-31.

128. *Id.* at 1831 (Scalia, J., concurring in part and dissenting in part).

129. *Id.* at 1832-33 (Scalia, J., concurring in part and dissenting in part). Scalia's basic point was that in the prior agency correspondence and prior versions of the regulation, reference was made explicitly to "articles produced and sold abroad" and "merchandise manufactured or sold in a foreign country." *Id.* (quoting 1951 correspondence from the Commissioner of Customs to Senator Douglas and prior versions of the regulation). Scalia argued that the agency therefore had interpreted the phrase "of foreign manufacture" to mean "manufactured in a foreign country." *Id.* at 1831-32.

The difficulty with Scalia's position is that the prior versions of the regulation would seem naturally to have *allowed* gray market competition in circumstances where Scalia argued gray market competition should have been *denied*. Thus, the common-control exception in the prior version of the regulation provided that gray market imports were allowed when "merchandise manufactured or sold in a foreign country under a trade-mark or trade name, which trade-mark is registered and recorded, or which trade name is recorded under [U.S. law], shall not [be barred] if such foreign trade-mark or trade name and such United States trade-mark or trade name are owned by the same person, partnership, association, or corporation." 19 C.F.R. § 11.14(b) (1969) (emphasis added). In a case involving a U.S. company that establishes a foreign manufacturing subsidiary (which was the case about which Kennedy and Scalia disagreed), the foreign sales of the product fall within the express language of the prior regulation. Moreover, there is no evidence at all that the agency intended to change the result in this case when it amended the section in the early 1970s. 35 Fed. Reg. 19,629 (Dec. 17, 1970).

Perhaps the real reason for Scalia's dissent is his concern that our trading partners will not "look favorably upon a regulation which, as now interpreted, treats goods manufactured by American companies on their soil more favorably than goods manufactured there by their own nationals." *Id.* 108 S. Ct. at 1833 (Scalia, J., concurring in part and dissenting in part). Yet as Justice Brennan's opinion correctly observes, both the statute and regulation were designed overtly to be protectionist and to favor U.S. companies. *Id.* at 1826-27 (Brennan, J., concurring in part and dissenting in part).

decline to assign any binding or authoritative effect to the particular verbiage Justice Scalia highlights. The quoted phrases are simply the Government's explanation of the practical effect the current regulation has in applying the statute, and come from the statement of the case portion of its petition for a writ of certiorari.¹³⁰

The three opinions in *K Mart* thus give us a good picture of three different approaches to statutory interpretation: (a) Kennedy subscribes to a strong version of the plain-meaning rule in which legislative history is not relevant (at least "in the first instance"); (b) Brennan (joined by Marshall, Stevens and probably White) uses the plain meaning as a starting point for analysis, but will usually resort to extrinsic materials in a search for congressional intent; and (c) Scalia (joined by Rehnquist, Blackmun and O'Connor) begins with the plain meaning, but, if the plain meaning is contrary to the interpretation offered by the government's lawyers or by the agency, will attach significant weight to that interpretation, even if it is contrary to the plain meaning.¹³¹

Although the decision in *K Mart* lays to rest a challenge to the regulations based on the language of the statute, the statute and regulations may still be challenged as being in conflict with various treaty obligations. Justice Scalia correctly observed that the interpretation of the statute adopted by the Court might conflict with commercial treaties according national treatment and most-favored-nation treatment to foreign manufacturers.¹³² There is certainly no doubt that the statute as interpreted is protectionist in its discriminatory treatment. Whether that discrimination violates any treaty obligations is an open issue.

IV. IMMIGRATION AND NATURALIZATION

The Court had two immigration and naturalization cases in the 1987-88 Term. In the first case, *Immigration and Naturalization Service v. Abudu*,¹³³ the Court considered whether it should review under an abuse of discretion standard a decision by the Board of Immigration Appeals (BIA) to refuse to reopen a deportation proceeding on the basis of newly discovered evidence. The BIA refused

130. 108 S. Ct. at 1818 n.4 (emphasis added).

131. On different approaches to statutory interpretation, see R.R. Kelso and C.K. Kelso, *Appeals in Federal Courts by Prosecuting Entities Other Than the United States: The Plain Meaning Rule Revisited*, 33 HASTINGS L.J. 187 (1981).

132. *K Mart*, 108 S. Ct. at 1833 (Scalia, J., concurring in part and dissenting in part).

133. *Immigration and Naturalization Service v. Abudu*, 108 S. Ct. 904 (1988).

to reopen the proceedings because the applicant failed to explain why the newly discovered evidence could not have been introduced earlier. The Court held, in accord with prior analogous cases, that the abuse of discretion standard applied.¹³⁴

Abudu, a citizen of Ghana, first entered the United States in 1965 on a student visa. He subsequently became a licensed physician and married an American citizen. Abudu's student visa authorized him to remain in the United States only until 1976, but Abudu overstayed his visa. Deportation proceedings were initiated following Abudu's criminal conviction of attempting to obtain narcotics by fraud. Abudu designated England as the country of deportation and expressly refused to seek asylum as a refugee. He was ordered deported on July 1, 1982.¹³⁵

On February 1, 1985, while his appeal from the deportation order was pending in the Ninth Circuit Court of Appeals, Abudu asked the BIA to reopen his deportation proceeding to consider his request for asylum. In that motion, Abudu "claimed that he had a well-founded fear that if England did not accept him and he was returned to Ghana, his life and freedom would be threatened by the regime in power."¹³⁶

The BIA denied the motion to reopen on two grounds. First, it held that virtually all of the facts alleged in the motion to reopen were available to Abudu at the time of his deportation hearing in 1981-82 and that Abudu had therefore failed to reasonably explain his failure to request asylum at that time.¹³⁷ Second, it held that, in

134. *Id.* at 907.

135. *Id.* Abudu argued in the deportation hearing that by marrying an American citizen, he was eligible for an adjustment of status. See 8 U.S.C.S. § 1255(a) (Law. Co-op. 1987). This argument was rejected because the drug conviction was, under 8 U.S.C.S. § 1182(a)(23) (Law. Co-op. 1987 & Supp. 1988), a nonwaivable ground for exclusion. *Abudu*, 108 S. Ct. at 907 n.1.

136. *Abudu*, 108 S. Ct. at 908.

137. BIA regulations provide that a deportation hearing will not be reopened unless "it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing," 8 C.F.R. § 3.2 (1987), and unless the alien has "reasonably explain[ed] the failure to request asylum prior to the completion of the exclusion or deportation proceeding." 8 C.F.R. § 208.11 (1987).

Abudu's fear of persecution in Ghana was based primarily on the change in 1981 of the government in power in Ghana. The new government allegedly "had carried out a systematic campaign of persecution against its political enemies," which included Abudu's "brother and certain close friends." *Abudu*, 108 S. Ct. at 908. Since the deportation proceeding had been open until July of 1982, however, the 1981 change in government was not a newly discovered fact.

The only new evidence that Abudu offered was a surprise visit in 1984 by a former long-time friend who had become a high government official in Ghana. The visitor invited Abudu, who was by then a qualified physician, to return to Ghana. The BIA held that this evidence was not probative since the visitor "in fact may have been paying a purely social visit." *Id.*

the absence of more specific allegations and affidavits, "his conjectures about probable threats were too speculative to constitute a prima facie showing of eligibility for either asylum or withholding of deportation."¹³⁸

The Ninth Circuit held, focusing entirely upon the BIA conclusion that no prima facie case had been stated, that it would review the BIA decision under the same standard used to review summary judgment motions in federal court.¹³⁹ The Supreme Court reversed the Ninth Circuit's decision, holding, first, that the Ninth Circuit had improperly focused all of its attention on the prima facie case ground for denial, and had ignored the BIA conclusion that Abudu did not reasonably explain his failure to assert his claim in the 1981-82 proceeding.¹⁴⁰ The Court further held that the BIA conclusion must be reviewed under an abuse of discretion standard.¹⁴¹ The Court analogized a motion to reopen to "a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden."¹⁴² The Court expressly refused to decide what standard of review should apply to a BIA determination that no prima facie case had been stated in an application.¹⁴³

Abudu is the most recent in a long line of Supreme Court decisions that treat deportation decisions by the BIA as unique administrative determinations. According to the Court, since Immigration and Naturalization Service (INS) officials must be especially sensitive to political functions that involve questions of foreign relations, the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative proceedings apply with even greater force in INS proceedings.¹⁴⁴

In the second immigration case heard during the 1987-88 Term, *Kungys v. United States*,¹⁴⁵ the Court attempted to clarify the standards used in certain denaturalization proceedings. Kungys was granted a visa in 1948 and became a naturalized citizen in 1954. In 1982, the

138. *Abudu*, 108 S. Ct. at 909.

139. *Id.* Under that standard, the BIA should have drawn all reasonable inferences from the complaint in favor of Abudu, and a reasonable inference from the 1984 visit was that Abudu would be subject to persecution in Ghana. *Id.* at 910.

140. *Id.* at 911.

141. *Id.* at 912-13.

142. *Id.* at 914.

143. *Abudu*, 108 S. Ct. at 911.

144. *Id.* at 914-15.

145. *Kungys v. United States*, 108 S. Ct. 1537 (1988).

Department of Justice began denaturalization proceedings against Kungys, alleging three grounds for an order of deportation:¹⁴⁶ (a) That in 1941 Kungys had participated in executing over 2,000 Lithuanians in Kedainiai, Lithuania; (b) That in applying for his visa and in the naturalization proceedings, Kungys made false statements about the date and place of his birth, wartime occupations, and wartime residence;¹⁴⁷ (c) That the false statements demonstrated that Kungys lacked the good moral character required of applicants for citizenship status.¹⁴⁸

The district court found against the government on all three grounds.¹⁴⁹ The court of appeals affirmed in part and reversed in part. It found in favor of the government on the second ground, and against the government on the third ground. Having found in the government's favor on the second ground, the court did not consider whether there was any error in the district court's consideration of the first ground.¹⁵⁰ Therefore, when the case came before the Supreme Court, the only possible grounds for denaturalization were material misrepresentations or concealments and lack of good moral character. The underlying facts for both grounds concerned Kungys' statements about his place and date of birth and his residence and occupation during the war.

The first problem for the Court was to agree upon a standard for what constitutes a "material fact" under 8 U.S.C. § 1451(a). In an earlier case, *Chaunt v. United States*,¹⁵¹ the Court apparently had held that the government's burden under Section 1451(a) was "to show by 'clear, unequivocal, and convincing' evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."¹⁵²

146. *Id.* at 1543-44.

147. 8 U.S.C. § 1451(a) (1982) provides that an order granting citizenship may be revoked if "such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation." *Id.*

148. 8 U.S.C. § 1427(a) (1982) provides that an applicant for citizenship be "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." *Id.*

149. *Kungys*, 108 S. Ct. at 1544.

150. *Id.*

151. *Chaunt v. United States*, 364 U.S. 350 (1960).

152. *Id.* at 355 (quoted in *Kungys v. United States*, 108 S. Ct. 1537, 1545 (1988)).

Lower courts struggled for almost thirty years to interpret and apply this language, with little consistency.¹⁵³ In *Kungys*, the Court abandoned the language from *Chaunt*, describing it merely as "dicta."¹⁵⁴ In its place, a majority of the Court adopted the following formulation for "material": "a concealment or misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decision-making body to which it was addressed."¹⁵⁵

Applying this general test to the specific context of a denaturalization proceeding before the INS, the majority held that "the test of whether *Kungys*' concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the INS."¹⁵⁶

The third ground for denaturalization was that *Kungys* lacked good moral character. According to 8 U.S.C. § 1101(f)(6), a person is deemed not to be of good moral character if he "has given false testimony for the purpose of obtaining any benefits under this chapter."¹⁵⁷ The same majority of the Court held that any false testimony, even *immaterial* false testimony, satisfies section 1101(f)(6).¹⁵⁸ Although this may seem a rather extreme interpretation, the Court justified it by highlighting two limitations on section 1101(f)(6):

First, 'testimony' is limited to oral statements made under oath. The United States concedes that it does not include 'other types of misrepresentations or concealments, such as falsified documents or statements not made under oath.' [citations omitted] Second, § 1101(f)(6) applies to only those misrepresentations made with the subjective intent of obtaining immigration benefits.¹⁵⁹

The Court then remanded for consideration of two further issues: (a) whether *Kungys*' misrepresentations constituted "testimony"; and

153. *Kungys*, 108 S. Ct. at 1545 (citing cases). The Court's one attempt to forge a consistent interpretation of *Chaunt* in *Fedorenko v. United States*, 449 U.S. 490 (1981), was unsuccessful. *Kungys*, 108 S. Ct. at 1545.

154. *Kungys*, 108 S. Ct. at 1545.

155. *Id.* at 1546 (noting, e.g., *Weinstock v. United States*, 97 U.S. App. D.C. 365, 367-68, 231 F.2d 699, 701-02; *United States v. Corsino*, 812 F.2d 26, 30-31 (1st Cir. 1987)).

156. *Kungys*, 108 S. Ct. at 1547. In defending this test against the seemingly more specific language from *Chaunt*, the Court noted that "[t]hrough this formulation may seem less verbally precise than *Chaunt*, in application it may well produce greater uniformity, since judges are accustomed to using it, and can consult a large body of case precedent." *Id.*

157. 8 U.S.C. § 1101(f)(6) (1987).

158. *Kungys*, 108 S. Ct. at 1537.

159. *Id.* at 1551.

(b) whether Kungys had the requisite subjective intent.¹⁶⁰

Although it may seem that the Court settled and clarified many important issues, lower courts are likely to find that *Kungys*, like *Chaunt* and *Fedorenko*, is subject to varying interpretations. The most serious problem is that although a majority of the Court agreed upon a formulation for the materiality requirement, a majority could not agree upon how to apply that test to the facts. Justice White, who provided the fifth vote for the majority, dissented from the result reached in the case.¹⁶¹ The critical difference between Justice White and the plurality was that White would allow the INS to attach significance to the fact that Kungys made a misrepresentation:

I would ask not only whether these misrepresentations of fact would have a natural tendency to influence the decisions of the INS, but also whether the fact of these misrepresentations *itself* would have had such a tendency. In other words, the proper inquiry is not only whether the true date and place of birth, in isolation, would have aroused suspicion, but whether an investigation would have ensued had petitioner revealed the true facts and thereby disclosed the discrepancy between them and the false statements in his supporting documents.¹⁶²

The plurality disagreed, however, and indicated that the only appropriate question was whether the actual date and place of birth would have led to the discovery of other facts relevant to Kungys' status.¹⁶³ In the plurality's view, "what is relevant is what would have ensued from official knowledge of the misrepresented fact (in this case, Kungys' true date and place of birth), not what would have ensued from official knowledge of inconsistency between a posited assertion of the truth and an earlier assertion of falsehood."¹⁶⁴

To further confuse matters, there were two separate concurring opinions in *Kungys*. Justice Stevens (joined by Justices Marshall and Blackmun) believed that the materiality requirement meant that "in the denaturalization context, the only statements that are capable of influencing the outcome are those that conceal disqualifying facts or that prevent or hinder the discovery of disqualifying facts."¹⁶⁵

For Stevens, the ultimate question was whether there existed any disqualifying facts that would have been revealed but for the mis-

160. *Id.* at 1552.

161. *Id.* at 1562, 1563 (White, J., dissenting).

162. *Id.* at 1566 (White, J., dissenting) (emphasis in original).

163. *Kungys*, 108 S. Ct. at 1548.

164. *Id.* at 1549.

165. *Id.* at 1555 (Stevens, J., concurring).

representation.¹⁶⁶ The plurality rejected this view, however, because according to Justice Stevens' concurrence, citizenship obtained by deceit may be revoked, but only for a reason other than deceit.¹⁶⁷ In the plurality's view, once a material misrepresentation has been shown, a presumption arises that the true facts, if known, would have disqualified the applicant for citizenship. The presumption is rebuttable on a showing by the naturalized citizen that the statutory requirement as to which the misrepresentation *had a natural tendency* to produce a favorable decision, was in fact met.¹⁶⁸

The second concurrence, by Justice Brennan, further confuses matters. According to Brennan, the presumption of ineligibility arises only if the Government can produce evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed. A mere *possibility* that a disqualifying fact *might have* existed should not entitle the Government to the benefit of a presumption of ineligibility.¹⁶⁹

Given the several opinions by the Court, it is fair to question whether the law has been clarified or confused by *Kungys*. This writer's view is that the Court has taken a bad situation and made it worse. Although it apparently resolved the proper formulation of the materiality requirement, *Kungys* leaves lower courts with no guidance whatsoever on how to apply that requirement. The result, no doubt, will be continuing confusion as lower courts struggle to interpret the actions of a badly fractured Court.

166. Applying that standard to the second and third grounds for denaturalization, Stevens would have found against the government on both. *Id.* at 1554 (Stevens, J., concurring). He would have remanded the case to the court of appeals for its initial consideration of the first ground for denaturalization (i.e., participation in the execution of over 2,000 Lithuanians). *Id.* at 1562 (Stevens, J., concurring).

167. *Id.* at 1550.

168. *Kungys*, 108 S. Ct. at 1550 (emphasis in original). In reaching this conclusion, the plurality relied both upon the materiality requirement and the independent requirement that the citizenship be "procured by" the misrepresentation. *Id.* See 8 U.S.C.S. § 1451(a) (Law Co-op. 1986 & Supp. 1988) (power to institute proceedings to cancel certificate of naturalization procured illegally or by concealment or misrepresentation).

169. *Kungys*, 108 S. Ct. at 1553 (Brennan, J., concurring) (emphasis added).

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